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In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 879

MAMIE BISHOP, LEONARD SCHUMPERT, JANICE THOMAS, AUGUSTUS HUMPHERY and JUANITA UMPHRYES,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio.

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Petitioners,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States of America:

The petitioners, Leonard Schumpert, Mamie Bishop, Janice Thomas, Augustus Humphery and Juanita Umphryes, pray that a write of certiorari issue to review the judgment of the Cuyahoga County Ohio Court of Appeals, made and entered by said Court on the 1st day of June 1964 (a copy of which is attached hereto as Appendix I).

The Ohio Supreme Court refused further appellate review which entries are attached hereto as Appendixes II and III (also, see 177 Ohio St. 57 [October 14, 1964]). A Rehearing was denied by the Ohio Supreme Court on November 18, 1964, which entry is designated herein as Appendix IV, thus making the judgment of the Court of Appeals final on that date—that is, November 18, 1964.

OPINIONS OF THE COURTS BELOW.

No opinions were rendered by the various courts in Ohio; hence, this cause is being presented from the posture that all the constitutional issues raised by the petitioners were resolved by the Ohio Courts against our contentions, and that the challenged judgment of the State Court does not purport to be based on independent State grounds. Also, that decisions on the federal constitutional questions were essential to the determinations made by that Court.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The jurisdiction of this Court is invoked under Title 28 U. S. C. A. § 1257(3), which section pertinently provides:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: * * *, (3) by writ of certiorari * * * where any title, right, privilege or immunity is specially set up or claimed under the constitution."

This cause also involves the introduction in a state court of evidence seized in violation of the Fourth and Fourteenth Amendments to the United States Constitution.

QUESTIONS PRESENTED FOR REVIEW.

I.

Whether the petitioners' convictions under R. C. of Ohio § 2915.13 is contrary to the due process clause of the Fourteenth Amendment to the United States Constitution because of the admission of evidence seized in violation of the "constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain"?

II.

Whether a sufficient basis for the determination that probable cause existed to support the issuance of a search warrant was afforded by an affidavit which merely alleged:

a. that various items generally associated with the numbers game were in the possession of unknown persons, and

b. that such items were possessed by these "unknown persons" with the intent by them to commit a crime involving the numbers game, and

c. that affiant's belief was predicated on observation by the Cleveland Police and information from confidential sources.

III.

Whether a state court can refuse to require disclosure of an unnamed and unidentified informer where no probable cause can be shown to exist without the information of such informer?

IV.

Where an officer seeks a warrant based in part upon information supposedly supplied by an informer, whose identity is neither disclosed in the affidavit, nor inquired into by the magistrate, and where the affidavit does not disclose any basis for crediting the informer's information, can a trial court:

a. refuse to require that the identity of such informer be disclosed, and/or

b. allow the officer to conclusively establish that an alleged informer is reliable simply by affirming that he had supplied information in the past that was accurate.

V.

Can a State authorize the practice of permitting applicants for warrants to bolster their affidavits by the rendition of secret and unrecorded testimony to issuing magistrates; or, is the requirement of the constitution such that an affidavit is fatally defective when "it does not set forth any * * * sufficient basis upon which a finding of probable cause could be made," notwithstanding any supporting evidence that may have been considered by the issuing magistrate, but was not a part of the affidavit?

VI.

Whether a police officer can trespass upon private property in violation of the Constitution and state law, there secretly eavesdrop, and use what was supposedly heard as a basis for the establishment of probable cause for the issuance of a search warrant?

CONSTITUTIONAL PROVISIONS WHICH THE CASE INVOLVES.

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the Constitution of the United States provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws." (Emphasis added.)

STATE OF THE PROCEEDINGS AT WHICH, AND MANNER IN WHICH, THE FEDERAL QUESTION SOUGHT TO BE VIEWED WAS RAISED.

Prior to trial petitioners formally filed their "Motion to Quash Search Warrant and Motion to Suppress [the Evidence]." It was alleged not only that the search warrant was issued without the requisite probable cause, but that the affidavit and warrant contained patent constitutional infirmities. Also it was alleged that the search warrant as issued authorized a general or exploratory search

in defiance of the constitutional proscription against unreasonable searches and seizures.

The reasons set forth in the written motion were supplemented during and following the pre-trial hearing when it was disclosed that the police trespassed and eavesdropped within the curtilage of the premises ultimately searched, and there acquired information relied on to establish probable cause. These issues, as well as those involving the existence and reliability of the alleged informant, were briefed and argued in the Trial Court, the Ohio Court of Appeals, and the Supreme Court of Ohio.

STATEMENT OF CASE.[1]

The petitioners were charged and convicted of violating Revised Code of Ohio § 2915.13. Specifically they were jointly charged with carrying on a scheme of chance; this crime is a felony under the laws of this State.

Prior to trial, the petitioners filed a joint "Motion to Quash the Search Warrant and to Suppress" as evidence certain property seized in violation of the Fourth and Fourteenth Amendments to the United States Constitution.[2] This Motion was denied and after a trial on the merits, in which the evidence sought to be suppressed was considered, the petitioners were convicted.

In due season, petitioners appealed this judgment to the Intermediate Court of Appeals and to the Supreme Court of Ohio. Although neither Court rendered a formal opinion, the convictions were upheld in both courts.

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[1] The complexity and nature of the issues herein require a somewhat detailed statement of the case.

[2] A copy of this Motion is attached to this petition and designated Appendix VII.

I.

The transcript of the trial evidence, hereinafter referred to as (R) shows as follows:

In opposition to the allegations set forth in petitioners' "Motion to Quash the Search Warrant and to Suppress" the evidence, the State's first witness, Lieutenant Carl Delau, testified that as a Sergeant of Detectives assigned to the Bureau of Special Investigations he was primarily concerned with investigating rackets and gambling operations. The officer testified that the investigation, which the State contended resulted in these arrests, began on May 14, 1962, and that "[he] received information during the morning of that particular day, Monday, May 14, 1962, from a reliable source that a John Powers was running a clearinghouse office at 12805 Edmonton" (R. 138). Officer Delau added that he and another officer later made observation of this address, which was where Powers lived, for the purpose of seeing if a 1959 Tan Buick —to which they had a partial license number—was on the scene, and that it was not (R. 22).

Next the officer stated that on the 15th, he and Patrolman McCool again made a surveillance of the vicinity of 12805 Edmonton and that about 2:15 p. m. "John Powers came driving down the street in his '59 Buick." Powers was said to have had a woman in the car with him; both entered the house. After being inside for about 10 minutes, both returned to the car and drove to Woodside (the next street north); the officers did not pursue them (R. 22-23). The Lieutenant admitted that he could not identify the woman who was with Powers.

On the following day the officers returned to the vicinity where they later saw Powers driving a 1961 Falcon; again there was an unidentified woman with him (R. 24). Also, that on this occasion both got out of the car and en-

tered the home, returning in about 5 or 10 minutes, and then proceeded in the Falcon to the front of 12611 Woodside, where they picked up two other women, who were waiting between the porch and the sidewalk. Again the officer admitted he did not know the females (R. 25). And when asked "Did you at any time learn their names?" replied: "No, I did not but I have my suspicions" (R. 25). Powers then was said to have continued east to 125th Street where he parked in front of 739 East 125th Street. The officer added: "At that time, I was just a short distance behind him. I seen three women hurriedly get out of the car and walk alongside the building of 739 East 125th, and they walked alongside this building towards the rear * * *" (R. 26). Lieutenant Delau next stated that Powers also got out of the car, went into a tavern, came out, and then disappeared. In the officers' words, "I did not see where he went" (R. 27).

On the following day—that is, the day of this arrest —Delau testified he assigned Patrolmen Wandra and McCool to make observations of 739 East 125th (this building was described as a two story brick building which had on the ground floor, in the front, several store fronts. In the rear on both the 1st and 2nd floors there were a total of six apartments). Delau gave officers Wandra and McCool these instructions:

> "* * * what to watch for there where the three girls disappeared to and where Powers had disappeared to and the instructions to ascertain just what door they went into and where they could have gone in that particular building which was under suspicion." (R. 30.)

Patrolman Wandra, in his evidence, testified that pursuant to these instructions he observed (about 2:30 p. m.) that John Powers and two females arrived in the Falcon

and entered a door on the south side of 739 East 125th Street. Officer Wandra then indicated that he posed as an insurance agent and made inquiries in the building to determine the correct address of the building (R. 36). Next, he entered the building by opening the door (R. 37), and that on the first floor there were two apartments but he did not hear any noise or activity coming from them. He then proceeded to the second floor "which housed apartments No. 5 and No. 5."[3] Also, that "[t]here was noise coming from both apartments; there was a radio and voices of humans talking and also adding machine noises" (R. 38).

Patrolman Wandra added that armed with this information he returned to his car and informed Patrolman McCool, the officer working with him, of his belief that the noises came from apartments No. 5 and No. 6. McCool then called Sergeant Delau, who began the warrant process (R. 40-44).

A further sequence of testimony revealed that upon receiving McCool's call between 3 and 3:15 p. m. Sergeant Delau contacted an assistant police prosecutor and related what information had been obtained over the past few days. Following which he was issued an affidavit for a search warrant (R. 44). (See Appendix V.) Delau a ter this stated that he located Judge Fuerst, who signed the affidavit upon which this warrant is based (R. 47). (See Appendix VI.)

Significantly, this experienced officer t stified that in procuring the signed affidavit from the Judge: "I told him what observations we made of the location, 739, the three

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[3] Of no mean significance is the fact that the location of the access stairway and hallways to these apartments was completely inside the building; hence, necessarily required that the officer trespass in order to listen at the doors "to see what the persons inside were doing" (R. 140-141).

days of observation, *the fact that there were two officers already on the scene* but were returning to Central Station. I indicated to him we were desirous of effecting a search that particular afternoon, and I related to him what we had found on making observation of that particular location." ([R. 46] Emphasis added.)

On cross examination Delau limited the extent of his conversation with Judge Fuerst. In this regard the following segment of that testimony is compelling:

"Q. In all about how long would you say you talked with Judge Fuerst?

A. It was probably no more than 5 minutes again, also.

Q. You were in a hurry?

A. I did inform him we were in a hurry.

Q. You indicated to him that you had already talked with Paul White? [The assistant prosecutor who prepared the affidavit.]

A. Yes, I did.

Q. And that Paul White had given you that affidavit which was marked State's Exhibit 2?

A. That is correct, yes.

Q. And you indicated that you wanted a warrant from him based on that affidavit?

A. I wanted a warrant from the clerk's office.

Q. Yes.

A. I wanted him to sign the affidavit.

* * * * *

Q. Now, when you talked with Judge Fuerst, did you tell him that you had information from a confidential, from confidential sources?

A. I related we had information, we started—

Q. No, no, did you tell him that you had information from confidential sources?

A. Yes, I did.

Q. All right. He read over this, didn't he?

A. He did

Q. And on here you said that you had made—you said this, "Observations made by members of the Cleveland Police Department and information from confidential sources"? Your conversation with him was about that?

A. That's correct.

Q. And you told him that you had seen—you had been been out there yourself personally on two previous days?

A. That is right.

* * * * *

Q. When you were out there making these observations, you didn't see anybody doing anything wrong, did you?

A. We did not.

Q. Yes, because if you had, you would have placed them under arrest?

A. Not necessarily.

Q. So that you told him the types of observations that you made?

A. Yes.

Q. And that type of observation is exactly what you told this Court?

A. That's correct.

Q. That you had not seen anyone, then, that you knew other than John Powers?

A. That is correct.

Q. And it is fact that during the observations that you made, you did not see anyone that you knew other than John Powers?

A. That is right.

Q. And the information that you had relative to John Powers concerned an address on Edmonton Avenue?

A. The original information was on Edmonton Avenue, that's correct.

Q. You are not suggesting to the Court that there was some additional information given you?

A. No, other than what we developed from that original information.

Q. Yes, but the only information that you had gotten from a confidential source related itself, did it not, sir, to John Powers and an address on Edmonton Avenue?

A. That is right.

Q. Yes, so that when you told Judge Fuerst that you had information from confidential sources, you didn't tell him what that information was, did you?

A. Yes, I did.

Q. You told him then that you had information that John Powers was operating a clearing house on 126—some odd number, Edmonton Avenue?

A. 12806 Edmonton Avenue.

Q. 12806 Edmonton Avenue; did you tell him who this confidential person was?

A. I don't believe I did.

Q. You don't believe you did, and he didn't inquire, then, did he?

A. No.

Q. Because if he had inquired, you would have told him?

A. I would have." (R. 58-62)

In this same sense consider also the following segment of testimony taken from Lieutenant Delau's cross examination:

"Q. I believe you testified that you talked with Patrolman McCool, over the phone and he related to you what had been told him by Mr. Wandra concerning Mr. Wandra's surveillance of the apartment?

A. Both his and Wandra's together and Wandra's separately, yes, Patrolman McCool related that to me.

Q. Yes, but you didn't talk with Wandra?

A. No, I did not, sir.

Q. So that when you talked with Judge Fuerst, you were relying in part on Mr. McCool's version of what Mr. Wandra had told him?

A. I was relying on what Patrolman McCool told me.

Q. And he told you what had been told him by Mr. Wandra?

A. That is correct." (R. 95-96)

The warrant actually issued was one of the infamous "John Doe" warrants which are a part of the Cleveland Police Department's *modus operandi*. (See, *State v. Young*, 185 N. E. 2d 33 [1962].) Moreover, according to the affiant, he preferred this type of warrant because "[they] wanted authority to search the persons on the premises who would be found there" (R. 73). In any event, Delau admitted that although he suspected that Mamie Bishop and John Powers would be found on the premises, their names were not specified in the affidavit; further, he did not reveal to the magistrate the fact that he suspected that these particular persons would be present.

"Q. Now, Lieutenant, when you went to this address, then, you're telling the Court that you expected to find at least Mamie Bishop and John Powers on the premises?

A. Yes, I did.

Q. You did?

A. I was pretty sure that I might see them there.

Q. Then why didn't you have this search warrant for those people you say you expected to find on the premises?

A. The prosecutor thought it was more appropriate to leave it as is to include everyone who might be on the scene taking part in an illegal operation.

Q. In other words, you wanted some additional authority so that you could search anybody that you saw fit on the basis of a John Doe warrant?

A. I wanted authority to search the persons on the premises who would be found there?

Q. Whether you had any reason to believe that they would be there or not?

* * * * *

A. I had reason to believe that there would be some 4 or 5 people there.

Q. So that when you told Judge Fuerst that you believe[d] this, believed numbers paraphernalia would be in the possession of unknown persons, you deliberately did not tell him that you believed it would be in the possession of John Powers and Mamie Bishop because you wanted to have complete authority to search everybody on the premises?

* * * * *

A. I wanted the authority to question and arrest anyone who would be in violation on that particular premises.

Q. But, Lieutenant, isn't it a fact that you always have authority to arrest people you see in violation of the laws?

A. That is true.

* * * * *

Q. If you went upon that premises with a warrant authorizing you to search it on the basis of information that you reasonably believed to the effect that Powers and Bishop had numbers paraphernalia in their possession, were operating a clearing house office there, and you saw other persons there engaged in that activity, you would arrest them, wouldn't you?

* * * * *

A. I would have.

Q. You would arrest them because you would have found them violating a law in your presence?

A. That is correct.

Q. And you could have questioned them and the same things that you could have done on the basis of this unknown person's warrant, couldn't you?

A. That is right.

Q. But the fact remains, Officer, you didn't expect to find Mamie Bishop there, did you?

A. I thought she could be there. I had a suspicion she could be there.

Q. But you didn't have any facts to support that suspicion, did you?

A. Not that we had seen her walk in, no.

Q. You hadn't even seen John Powers going in there, had you?

A. I had seen him walking into that building. My partner had seen him on that particular day.

Q. And when you arrived there with your warrant, he was not there, was he?

A. He was not" (R. 72-75).

As to the "informer," Delau was specifically asked to reveal the informer's name (R. 92). In this regard, counsel moved the Court to instruct the officer that disclosure was required (R. 92-93). The Court, citing *State v. Beck*, 175 Ohio St. 73, denied the request for disclosure (R. 95).

II.

Evidence presented by petitioners in support of their Motion included the testimony of Joseph Harper, one of the original defendants, who related that he had arrived on these premises only about twenty minutes before the officers made their entry (R. 198). Harper indicated he heard a knock at the door and Miss Umphryes, one of the petitioners, said: "Is that you Plug" and "someone answered someone said something. Anyhow she opened the door" (R. 199). Next he recalled that at first there was a bit of needling and after about 10-15 minutes, from the time the officers entered, while they were in the process of searching Schumpert and him, one of counsel's business cards was found, at which point Lieutenant Delau remarked: "Incidentally I have a search warrant." (R. 201.)

The petitioner, Umphryes, testified that she heard someone knock on the door, and when she inquired: if it were "Plug," her boy friend whom she was expecting, someone answered "yes," and that she "opened the door, seen it was white man, someone that I didn't know. I tried to close the door, and *it was forced open.*" ([R. 224] Emphasis added.)

Lieutenant Delau was quoted by this witness as having remarked: "I am Sergeant Delau, you are under arrest. This is a raid." (R. 224-225.) Further, in describing the personal search made of Harper and Schumpert, she added that when he came across counsel's business card Officer Delau exclaimed: "Incidentally I have a search warrant." (R. 225.) This was said to have occurred after the officers had been on the premises "Oh, a good ten minutes." (R. 226.)

When cross examined concerning the nature of the entry made by the officers, her testimony was amplified. Consider in this regard, the following significant segment of her testimony during cross examination:

> "Q. I believe what you said was when you opened the door you saw Sergeant Delau and he was a white man, is that right?
>
> A. Yes.
>
> Q. And you didn't know at that time whether Sergeant Delau was a police officer or whether he was a friend of Schumpert or Harper, did you?
>
> A. All I know is that I didn't know him.
>
> Q. You didn't know him, all right. When you were in the doorway there, did he tell you he was a police officer?
>
> A. In the doorway?
>
> Q. Yes.
>
> A. After he came in the door.
>
> Q. When you opened the door up, the first time you laid eyes on Sergeant Delau and realized he was

a white man, did he say anything to you to the effect that this was the police?

A. No, he did not." (R. 232-233.)

III.

In denying the Motions the trial court specifically held: "In this case, we have not only the word of an unnamed informer but we have primarily the observations of the police officers." (R. 316.) These observations were, of course, those particularized in the testimony of the officers. The sum effect of which was that none of the petitioners had been seen entering the premises and Patrolman Wandra actually trespassed on private property to eavesdrop for the express purpose of illegally obtaining facts to support the issuance of a warrant.

Also, the Court concluded that each of the officers gave evidence in support of the affidavit. This conclusion not only ignores the fact that Lieutenant Delau testified in a fashion inconsistent with such idea,[4] but the more obvious fact that there was nothing that could have been contributed by these officers to support this quest for a warrant.

Relative to the defense argument that Patrolman Wandra in gaining entrance to this private hallway of the

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[4] Officer Delau in testifying as to what he told the issuing magistrate in the "no more than 5 minutes" (R. 58) he talked to him stated: "I told him what observations we had made of the location * * * the fact that there were two men already on the scene but were returning to Central Station." (R. 46.) The problems involved in issuing warrants based on oral hearing as to probable cause are of no mean proportions. "If the supporting oath or affirmation is in written affidavit form and made a part of the search warrant the facts are readily passed on. If it was oral it is doubtful from a practical view-point whether it can ever be reproduced with exactitude, and an accused would never have an opportunity of knowing until he questioned the sufficiency of the showing of probable cause what the facts were upon which the warrant was issued." *Bedermarzik v. State*, 204 Ind. 517, 522 (1933).

building, for the purpose of eavesdropping, was thereby trespassing, the Court ruled that: "There was no trespassing upon the property of any of the defendants; that if, even conceding this could be a trespass, this was trespassing upon the whole property of the entire apartment and was not a trespass into the apartment of any one of the defendants."

As to this ruling, it is not clear what the court is saying; we will assume, however, that it was not holding that the petitioners did not have "standing to suppress." This is so because that argument was laid to rest in *Jones v. United States*, 362 U. S. 257 (1960).

ARGUMENTS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

No longer is it permissible for State Courts to sanction the wilful intrusions into one's rights of privacy by the police, or to otherwise negate constitutional rights guaranteed by the federal constitution. Certainly, it was because of the unwillingness of Ohio, among other states, to vindicate these rights that this Court's decision in *Mapp v. Ohio*, 367 U. S. 643 (1961), was absolutely required. *Ker v. California*, 374 U. S. 23 (1963), in turn imposed on the states the applicable standards of reasonableness, and *Beck v. Ohio* _____ U. S. _____ (1964), can only be viewed as another decision designed to compel the enforcibility of the Fourth Amendment by State Courts.

This cause, here on a petition for writ of certiorari, again brings before the Court the serious questions involved when State officers are permitted to conclusively predicate "probable cause" upon information supposedly supplied by nameless and possibly phantom informers. In urging that this cause is worthy of consideration, to petitioners' advantage is the fact that the trial court in deny-

ing the petitioners' quest for the disclosure based its ruling on the precedential authority of *State of Ohio v. Beck*, 175 Ohio St. 73 (1963), which case was recently reversed by this Court.

Significant to this petition is the fact that when this cause was considered by the appellate courts of Ohio it was reviewed in the light of the Supreme Court of Ohio's prior determinations in *State v. Beck, supra.* As a result, the intervening determination made by this Court in *Beck v. Ohio* necessarily requires that the cause of petitioners be considered in the light thereof. *Cf., Doughty v. Maxwell, Warden*, 376 U. S. 202 (1964); *McLeod v. Ohio*, 378 U. S. 582 (1964).

Also, it is our contention that the warrant here was not supported by probable cause and that the decision of this Court in *Aguilar v. Texas*, 378 U. S. 108 (1964), is controlling in a situation such as this, in which the affidavit only recited that the applicant had reliable information from a confidential source. In addition, in this cause the officer upon inquiry admitted that the issuing magistrate neither inquired nor was told who the "informer" was; there appears no basis either in the affidavit or the testimony to support the conclusions that he even existed, to say nothing of his reliability.[5] For all that appears, as in *Aguilar*, the magistrate routinely accepted as truth the affiant's "mere conclusion" in preference to performing his "neutral and detached" function, which is opposite to serving "merely as a rubber stamp for the police." *Id.*, 378 U. S. at 111-113.

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[5] Surely the elements of Due Process are at least vulnerable to abuse where in issuing a search warrant the magistrate accepts without question, and the aggrieved party is denied the right to effectively challenge, a police officer's assertion that an informer is reliable and did in fact supply information upon which it was reasonable for the Court to rely in authorizing a search.

I.

A Warrant Issued Without the Requisite Probable Cause Is Void and Any Search Made Pursuant Thereto Is Unreasonable.

A. The Fourth Amendment to the United States Constitution provides (as do the constitutions and/or statutes of the various states, although not always in the same phraseology), that: "* * * no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Cf., R. C. of Ohio § 2933.22.

Probable cause is said to exist, where the facts and circumstances within the officers' knowledge and of which they have reasonably trustworthy information sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Brinegar v. U. S.*, 338 U. S. 160, 175 (1949).

Significantly, the affidavit filed herein alleged: that various items generally associated with the numbers game, were in the possession of unknown persons. That possession by these persons was with the intent to use such property to commit, either the crime of possession of bet slips or promoting a scheme of chance. Further the affidavit shows that it was based on observations by the Cleveland Police and information from confidential sources.

It seems appropriate to say that the purpose of the affidavit is to enable the appropriate magistrate to determine whether probable cause exists. According to this Court, the magistrate must judge for himself the persuasiveness of the facts relied on by the officers' conclusions as to the existence of probable cause *Giordenello v. United States*, 357 U. S. 480, 485 (1958). Also it has been

stated, that "* * * unless the magistrate makes his independent judgment on all known facts then he tends to become merely the tool of police interest." *Jones v. United States,* 362 U. S. 257, 273 (1960).

Suffice it to say, for an affidavit to be sufficient the requirement is that it must, standing alone, provide a basis for the determination that probable cause exists. In this affidavit such a basis is not afforded. At most the situation is comparable to the fact situation presented by *Giordenello v. United States, supra,* where it was held, and properly so, that where a warrant is issued without the requirement of probable cause it cannot form the basis for a valid search. And that an adequate basis for a finding of probable cause must be made to appear from the affidavit.

Judging the facts here by the standards imposed on the several states, by the Due Process Clause of the Fourteenth Amendment, we find merely that the affidavit issued to Sergeant Delau recited, first, that numerous items were in the possession of unknown persons at two different suites of an apartment building. Certainly, if as the law requires, he had in his possession sufficient facts to qualify for a warrant, he necessarily would have been able to state a designation other than "unknown persons."

Now two crimes are specified in the affidavits, i.e., possession of bet slips, and promoting a scheme of chance. On the other hand, it is clear that if the officers had "reasonable grounds to believe" or "probable cause" to believe persons were committing either one of these crimes it would have been proper to have secured an arrest warrant. Their failure to do so suggests the idea that the warrant was sought for the exclusive purpose of conducting an exploratory search. This thesis is supported by the fact that the warrant contained two addresses; trustworthy information would have been more specific.

Next, the affidavit suggests that members of the Cleveland Police Department made "observations." Even if the affidavit had shown that the affiant had made these observations, the mere recitation of that fact does not contribute anything to the sufficiency of the affidavit. The same is true of the mere statement "information from confidential sources." These conclusionary statements are at best indicative of the failure of the affiant to make a proper presentation to the issuing magistrate.

The test is not that the officer should be convinced of the existence of probable cause; the neutral and detached magistrate should be convinced. A proper affidavit would have stated what the information was that was received and would have included statements as to the reliability of the informant. The failure to observe these requirements very strongly exposes the thought that the affidavit did not allege sufficient facts as is required by law.

B. For a warrant to be proper it must particularly describe the place to be searched as well as the person or things to be seized. We begin with the premise that both general and exploratory seaches are unreasonable "per se." The same is true of warrants issued for that purpose. Here the warrant ostensibly authorized a search for a number of items; the mere possession of only one of which, a clearing house bet slip, constituted a crime. These other items specified in the warrant at most would be of an evidentiary nature; therefore, no warrant could be issued for their seizure. *United States v. Lefkowitz,* 285 U. S. 452, 464-465 (1932).

Although we concede that the argument being made at this juncture is ambitious, still the law is as stated in *Goulden v. United States,* 255 U. S. 298 (1921). In *Goulden,* some bills for legal services, an executed con-

tract and an unexecuted contract were seized under a valid search warrant by officers who were investigating an alleged use of mails to defraud the government. The Court held these documents were of "evidentiary value only" and therefore immune to seizure. Objects of "evidentiary value" are private articles or papers such as contracts, letters, invoices, etc., which are seized "solely for their use as evidence in a subsequent criminal trial."

It thus appears that with the exception of the bet slips, the items particularized in the warrant at best would have "evidentiary value only"; hence, their seizure even with a warrant would be unreasonable. See *Williams v. United States,* 263 F. 2d 487 (1959); *Morrison v. United States,* 262 F. 2d 449 (1958).

C. The warrant actually issued herein did not with sufficient particularity describe the place to be searched. The giving of *two* addresses not only belies the thought that probable cause existed; but more than that, it reflects on the specific requirement of a particular designation of a place to be searched. *A fortiori,* if the requirement for particularity of description of the place to be searched is to provide adequate means of identification which is not achieved by a description of two residences, when probable cause exists as to only one (*People v. Rainey,* 14 N. Y. 2d 35 [1964]; *United States v. Hinton,* 219 F. 2d 343 [1955]), then the warrant issued herein was void at its inception.

On the other hand, if the affiant had had probable cause sufficient for a warrant, at the very least, he could have offered an exact address. The same argument applies to the requirement of a particular description of the things to be seized, which requirement also appears to have been patently violated. (See *Marron v. United States,* 275 U. S. 192, 196 [1927], where this Court concluded that the re-

quirement of such particularity in a warrant is to make general searches under them impossible. And as to what is to be taken, nothing should be left to the discretion of the officer executing the warrant.)

D. General searches have long been deemed to violate fundamental rights and it is clear that the Fourth Amendment forbids them. The warrant issued herein in addition to "permitting" a search for evidence, in defiance of the constitution, purportedly was issued in the phantom case of "*State of Ohio v. John Doe* (real name unknown)," and alleged that the items mentioned were in his possession.

It is at once apparent, that if probable cause existed to arrest or search any individual then that person was capable of being described other than as "John Doe." If as the affidavit stated, the true name of "John Doe" (the person the officer swore was in possession of the "contraband") was unknown, then surely a suitable description could have been given. See 48 *Ohio Juris.* 2d, Search and Seizure, § 18, pp. 752-753; 47 *A. L. R.* 2d 1444.

Moreover, according to Lieutenant Delau's evidence, he only suspected that John Powers and Mamie Bishop would be on the premises. This admission by him is not only sufficient to expose the lack of probable cause, but dramatizes his, and the Cleveland Police Department's, ability to use devious methods to circumvent the constitution. This is so for two reasons, first there was no "probable cause" to believe any particular person would be on the premises. Next, if there were such "probable cause" then the persons should have been named or at least described. Cf. *Dow v. State,* 207 Md. 80 (1955); *Garrett v. State* [Okla.], 27 P. 2d 1101 (1954); *Parker v. State,* 177 Tenn. 380 (1941).

E. Knowledge obtained as a consequence of an unlawful or unreasonable search cannot be used to obtain a search warrant. Thus if the officers trespass (or otherwise intrude into a constitutionally protected area) in order to gain probable cause, the product of any subsequent search is considered "fruit of the poisonous tree." And under the "derivative evidence" rule is inadmissible to convict. *Silverthorne Lumber Co. v. United States*, 251 U. S. 385 (1920). Also see, *Nardone v. United States*, 308 U. S. 338 (1939). Cf., *Wong Sun v. United States*, 371 U. S. 471 (1963), in which the exclusionary rule was applied to voluntary oral declarations made during and as a consequence of an unconstitutional arrest.

Also in *Silverman v. United States*, 365 U. S. 505 (1961), this Court ruled on the constitutionality, under the Fourth Amendment, of the use of a "spike microphone," which the police inserted in a crevice of a party wall which permitted them to listen to conversations throughout the house, thus affording the means of gathering evidence. This decision was "based upon the reality of an actual intrusion into a constitutionally protected area." Here the Court agreed that even a technical trespass could not be indulged in to obtain probable cause, and declared that the constitution had been violated.

The same would of course be true if an officer should enter the yard, the curtilage, the hallway, or room of private premises. In this regard, see *Work v. United States*, 243 F. 2d 660 (1957), where the police without a warrant, and without cause to arrest or search, entered private premises and observed the defendant walk out of the house to an area under the porch. The officers who followed her saw something (that later turned out to be narcotics) being put into the garbage can located in the porch area, within

the "curtilage" of the home. In holding that the evidence was suppressible, the Court stated that "it would be unacceptably naive to conclude that this attempt by her to hide the [narcotics] immediately following the *presence of the officers in the hall,* and the finding of the [narcotics] by the officers, were not direct consequences of their unlawful entry. *Id.* at 662.

The analogy here is perfect; Patrolman Wandra was a trespasser when he invaded this hallway to eavesdrop. This is so, because it cannot be seriously argued that the stairway and halls of 739 East 125th were not within the curtilage of Apartment #6.

II.

The Statutes Requiring Notice of Authority and Purpose Before Forcing Entry Into a Private Home Are Strictly Construed.

Even if we assume that the warrant herein was in all respects properly issued, still the fact that it was not executed in compliance with the statute, in such cases made and provided, is alone sufficient to invalidate it and render a search ostensibly made pursuant thereto unreasonable. In this regard, our code provides that an officer may break down an outer door, or inner door, or window of a dwelling house or building if, after notice of his intention to make search pursuant to a warrant, he is refused admittance. R. C. of Ohio, § 2935.12.

This formality, which requires the police to say who they are and state why they demand admittance, is of ancient vintage, going all the way back to the 15tn Century in the English Common Law. Thus, an otherwise valid search can deteriorate into the zone of "unreasonableness" merely by failure to comply with the statute relative to execution thereof.

Of considerable importance in this phase of our contentions is the case of *Miller v. United States,* 357 U. S. 301 (1958). In *Miller,* the Supreme Court reversed the conviction of a notorious, and undoubtedly guilty narcotic peddler simply because the police, who broke into his apartment and found a large quantity of heroin, neglected to first announce their purpose and authority in demanding entrance.

The above case is further significant because there was an abundance of "probable cause" to enter the premises, although without a warrant, to effect an arrest. The Court held that this failure to comply with the statutory notice requirement rendered the search unlawful. It is submitted that the statute involved in the *Miller* case and Ohio's notice statute are sufficiently comparable to require comparable rulings for comparable violations by the police.

III.

When the Identity and Existence of an Allegedly Reliable Informer Is Material to the Establishment of Probable Cause, the Court Must Require Disclosure.

Lieutenant Delau (the arresting officer), in his evidence, attempted to justify his actions on the basis of "information" that had allegedly been given him. Now, the rule that an informer's tip may supply "probable cause" for an arrest or search must be regarded as subject to numerous exceptions and qualifications. *Jones v. United States,* 362 U. S. 257 (1960); *Draper v. United States,* 358 U. S. 107 (1959). None of these exceptions or qualifications can be realistically created from the facts here; hence, our discussion at this juncture is concerned only with the propriety of the trial judge's ruling against disclosure and his reliance on the authority of *State v. Beck, supra.*

In Ohio, there is no statutory privilege of confiden-

tiality between policeman and informer. *In Re Story,* 159 Ohio St. 144, 147 (1953).

Be that as it may, even in jurisdictions where the privilege exists, the disclosure of the identity is required in order to allow a challenge to the validity of an arrest or the propriety of the issuance of a warrant. This limitation on the applicability of the privilege arises from the fundamental requirements of due process. The problem has been said to involve the balancing of the public interest, in protecting the flow of information, against the individual's rights to have the issues raised by his defense properly determined.

The constitutions of both the State and Federal Government prohibit the issuance of warrants except upon "probable cause." This thought is also memorialized by statute in Ohio's R. C., § 2933.22. In this regard one of the prime issues raised by our Motion was the alleged non-existence of probable cause. Certainly in this posture the reliability of the informant, the credibility of the police officer who acted upon the information disclosed, and the soundness of the reason for reliance upon the information are proper matters for exploration by the defense. Thus an accused is entitled to know the identity of the informer, to compel his testimony and then impeach his credibility. *Rovario v. United States,* 353 U. S. 53 (1957).

Moreover, where a determination of the lawfulness of a search and seizure depends upon the disclosure of the identity of the individual who allegedly gave information which led to the search and seizure, failure to require the disclosure of such person's identity should render the search unlawful and require that evidence obtained from the search and seizure be suppressed. See, *United States v. Blich,* 45 F. 2d 627 (1932, D. C. Wyo.), where the District Court ruled that the existence of probable cause could

only be properly determined if the identity of the informer were disclosed.

The word of an informer can supply "probable cause" for an arrest or search in certain qualified instances. The test, as presently stated by the Court in *Draper v. United States,* 358 U. S. 307 (1959), seems to support the view that what is observed must conform with what an informer told him would occur. Further the informer must be reliable in that "an uncorroborated tip by an informer whose identity and reliability are both unknown does not constitute probable cause." *Contee v. United States,* 215 F. 2d 324, 327 (1954). Also see, *Wrightson v. United States,* 222 F. 2d 556 (1955); *Worthington v. United States,* 166 F. 2d 57 (1948).

Since the Court did not require disclosure, the status of this confidential source was reduced to anonymity. Certainly if identity had been disclosed the defense could have explored the reliability of the informer, produced evidence to rebut any such showing as well as further show that reasonable grounds for reliance did not exist. *Wong Sun v. United States,* 371 U. S. 471 (1963). Further, it is just as important to a defendant to have access to a material witness who may satisfy the Court that evidence against him should be excluded, because obtained by unconstitutional means, as to have access to a material witness who may give evidence which will overcome in the eyes of a jury, for example, prosecution evidence against him on the merits of the charge. *People v. Robinson,* 166 Cal. App. 416 (1958).

In the final analysis, the conviction herein being challenged stands or falls on the determination of whether there was probable cause, which in turn depends, among other things, not only upon the existence of an informer but his reliability. By denying the request for disclosure,

the right to test the reasonableness of the officers' conduct (including but not limited to the reasonableness of his reliance on such informer) was thereby frustrated. The real fault characteristic, in addition to foreclosing even the possibility of a rational appraisal by the Court, is that such procedure permits the policeman to conclusively determine the validity of his own arrest. Why such an approach is not consistent with the constitutional standards developed by the Supreme Court is obvious.

In our view the cogent arguments in favor of disclosure are most compelling. Consider, in this regard, the view expressed in *Jones v. United States,* 271 Fed. (2d) 494, 499 (1959) in which the rule was stated:

> "To give vitality to the requirement of reliability the law requires, if no probable cause exists without the information from informer, that his identity be divulged, so that his reliability may be subjected to a meaningful judicial scrutiny rather than accepted on a policeman's word."

CONCLUSION.

In seeking a reversal of the convictions herein, counsel is reminded of the sagacious remarks of Mr. Justice Jackson concurring in *McDonald v. United States*, 335 U. S. 451, 459 (1948):

> "While the enterprise of parting fools from their money by the 'numbers' lottery is one that ought to be suppressed, I do not think its suppression is more important to society than the security of the people against unreasonable searches and seizures."

Here it has been urged that the warrant, the arrest, the search and seizure were consummated not only in violation of the constitution but in defiance thereof. Fortunately this penchant, possessed by the Cleveland Police, for assuming that they will be protected and pampered in this area, and that they need not comply with the law, cannot and will not be sanctioned.

Ostensibly the warrant issued herein is premised on the idea that the officers had a right to search these premises because probable cause existed to believe that certain property subject to seizure was in the possession of various unknown individuals. As urged above, the failure of affiant to particularize or otherwise describe these persons must reflect adversely on the idea that they had such probable cause. Thus, in view of the prohibition against general or exploratory searches, a warrant to search premises merely to see who is in possession, if anyone, is invalid on its face.

This case then presents, *inter alia*, a serious question as to whether a search warrant could properly issue on an affidavit which only set forth the naked assertion that "the FACTS upon which * * * [affiant's] belief [that contraband was in the possession of 'unknown persons'] is based are as follows: observations by members of the Cleveland

Police Department and information from confidential sources" (Emphasis added).

Also presented is the question as to whether there is a necessity for the issuing magistrate to have knowledge concerning the reliability of an unnamed person on whose information the affiant's belief in part was said to be based, which facts would at least permit a judgment as to whether such informer was sufficiently trustworthy. *Aguilar v. Texas, supra,* at 114 fn. 4.

Additionally, there is the query as to whether this crucial determination of probable cause, to be made by a neutral and detached magistrate, can be based on facts other than those stated under oath in the affidavit; i.e., uncommunicated information possessed by the affiant or his good faith belief that probable cause exists.

In our judgment, the analogy between the case here on appeal and *Aguilar v. Texas* is almost perfect.[6] In reasoning to the conclusion in *Aguilar* this Court was concerned that the affidavit did not contain an affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein, nor did it (the affidavit) contain an affirmative allegation that the affiant's unidentified source spoke with personal knowledge. Further in footnote 4, of the opinion, the Court made the following cogent statement:

> "To approve this affidavit would open the door to easy circumvention of the rule announced in *Natherson*

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[6] In *Aguilar,* the following requirements for a State search warrant were set forth:

> "although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, * * *, the magistrate must be informed of * * * some underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, * * *, was credible or his information was 'reliable.'"

> and *Giordenello*. A police officer who arrived at the 'suspicion,' 'belief,' or 'mere conclusion' that * * * [contraband was] in somone's possession could not obtain a warrant. But he could convey this conclusion to another police officer, who could then secure a warrant by swearing that he had 'received reliable information from credible persons' that the * * * [contraband was] in someone's possession."

Surely, when the precedential authority of *Aguilar* is brought to bear on an affidavit such as is involved herein —which only recites the "mere conclusion" of the affiant that he had "information from confidential sources" and that "observations" were made—it cannot be said that these bare assertions provided a sufficient basis for the requisite determination that probable cause existed for the issuance of the search warrant.

Also, and quite apart from the patent defects in the warrant and supporting affidavit, are questions (1) involving the fact that, in trespassing upon private property in quest of evidence, the officers violated a State statute. This statute (R. C. of Ohio, § 2909.21) provides that "no person shall enter without lawful authority upon the land or premises of another." And (2) the right of a state to refuse to require disclosure of an unnamed and unidentified informer, where no probable cause can be shown to exist without his information.

Although this Petition was in the process of being printed when the decision of *Stanford v. Texas* (____ U. S. ____; 33 USLW 4140 [January 18, 1965]) was announced, it is being specifically inserted here because it does support our cause. Even more important it is petitioners' hope that Counsel for the Respondent will seek to distinguish it; bearing in mind, of course, in our "Motion to Quash

Search Warrant and Motion to Suppress" it was contended that,

"* * *,

(4) The search warrant as issued was further defective in the following respects: [a] was general in nature, [b] failed to particularly describe the place to be searched and the person, property or thing to be seized, * * *,

(6) That the warrant as issued authorized a general or exploratory search, the type of which is prohibited by law."

For the foregoing reasons it is therefore respectfully requested that a writ of certiorari be issued under the seal of this Court to the Cuyahoga County Ohio Court of Appeals to the end that the judgment of that Court may be reviewed and reversed.

JAMES R. WILLIS,
Attorney for Petitioners.

APPENDIX I.

JOURNAL ENTRY OF THE COURT OF APPEALS OF THE EIGHTH JUDICIAL DISTRICT OF OHIO, CUYAHOGA COUNTY.

(June 1, 1964.)

This cause came on to be heard on the appeal on questions of law from the judgment and sentence of the Common Pleas Court and was argued by counsel for the parties; and upon consideration, the Court finds no error prejudicial to the appellant and therefore the judgment and sentence of the Common Pleas Court is affirmed and it is ordered that appellee recover of appellants its costs herein taxed.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

Appellants except.

APPENDIX II.

JOURNAL ENTRY OF THE SUPREME COURT OF THE STATE OF OHIO DISMISSING APPEAL.

(October 14, 1964.)

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no substantial constitutional question exists herein.

APPENDIX III.

ORDER OF THE SUPREME COURT OF OHIO DENYING MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS.

(October 14, 1964.)

It is ordered by the Court that this motion is overruled.

APPENDIX IV.

ORDER OF THE SUPREME COURT OF OHIO DENYING REHEARING.

(November 18, 1964.)

It is ordered by the Court that rehearing in this case is denied.

APPENDIX V.

AFFIDAVIT FOR SEARCH WARRANT.

IN CLEVELAND MUNICIPAL COURT

Before me, Norman A. Furst a Judge of Cleveland Municipal Court personally came Carl Delan who being duly sworn according to law, deposes and says, that on or about the 17 day of May A. D. 1962, at the City of Cleveland in said County of Cuyahoga, the following described personal property, to-wit:

*1. Clearing House bet slips, bet sheets, tapes, adding machines and other paraphernalia generally associated with clearinghouse operations ~~of the value of~~ .....,

~~Dollars, the personal property of one ....., of said City and County, which personal property was by some person or persons unlawfully stolen, taken and carried away, taken by robbers, embezzled, and/or obtained under false pretenses.~~

2. ~~Weapons, implements, tools, instruments, articles or property used as a means of the commission of crime and/or~~ such objects or articles are in the possession of one unknown persons with the intent to use the same as a means of committing crime, to-wit:

possession of bet slips, promoting scheme of chance

3. ~~Forged or counterfeited coins, stamps, imprints, labels, trade marks, bank bills or other instruments of writing and/or dies, plates, stamps or brands for making them; books, pamphlets, ballots, or printed papers containing obscene language, prints, pictures, or descriptions manifestly tending to corrupt the morals of youth, obscene, lewd, indecent or lascivious drawings, lithographs, engravings, pictures, daguerreotypes, photographs, stereoscopic pictures, models or casts, and instruments or articles of indecent or immoral use, or instruments, articles or medicines for procuring abortions, or for the prevention of conception, or for self pollution.~~

4. ~~Gaming table, establishment, device or apparatus kept or exhibited for the unlawful gaming or to win or gain money or other property and money, or other property won by unlawful gaming.~~

5. That affiant believes and has good cause to believe that said personal property, or some part thereof is located and concealed in said City and County in a certain two story brick commercial & residential building, located at 739 E. 125 suites #5 & #6 up. ~~in said City and County and known as _____~~. Affiant further deposes

and says that the facts upon which such belief is based are as follows:

Observations by members of the Cleveland Police Department and information from confidential sources.

Search to be made in the day Season _____

Said affiant further says that John Doe (Real Name Unknown) did unlawfully have in his possession said personal property as aforesaid: _____ and further deponent says not; contrary to the form of the Statute in such cases made and provided and against the peace and dignity of the State of Ohio.

X CARL DELAN, Sgt.

Sworn to and subscribed before me, this 17 day of May A. D. 1962

RALPH S. LOCHER
Prosecuting Attorney
of Cleveland Municipal Court,

By PAUL D. WHITE.
Assistant Prosecutor.

NORMAN A. FURST,
Judge of Cleveland Municipal Court.

*(Strike out allegations not applicable)

APPENDIX VI.

PERSONAL PROPERTY SEARCH WARRANT.

To the Bailiff of Cleveland Municipal Court—

Greeting:

WHEREAS, there has been this day filed with me, Norman A. Fuerst, Judge of Cleveland Municipal Court, an affidavit for search warrant, of which the following is a copy:

Before me, Norman A. Furst a Judge of Cleveland Municipal Court, personally came Carl Delan who being duly sworn according to law, deposes and says, that on or about the 17 day of May A. D., 1962, at the City of Cleveland in said County of Cuyahoga, the following described personal property, to-wit:

*1. Clearinghouse bet slips, bet sheets, tapes, adding machines and other paraphernalia associated with clearinghouse operation ~~of the value of ....., Dollars, the personal property of one ....., of said City and County, which personal property was by some person or persons unlawfully stolen, taken and carried away, taken by robbers, embezzled, and/or obtained under false pretenses.~~

2. ~~Weapons, implements, tools, instruments, articles or property used as a means of the commission of crime and/or~~ such objects or articles are in the possession of one unknown persons with the intent to use the same as a means of committing crime, to-wit:

possession of bet slips, promoting scheme of chance

3. ~~Forged or counterfeited coins, stamps, imprints, labels, trade marks, bank bills or other instruments of writing and/or dies, plates, stamps or brands for making them; books, pamphlets, ballots, or printed papers con-~~

~~taining obscene language, prints, pictures, or descriptions manifestly tending to corrupt the morals of youth, obscene, lewd, indecent or lascivious drawings, lithographs, engravings, pictures, daguerreotypes, photographs, stereoscopic pictures, models or casts, and instruments or articles of indecent or immoral use, or instruments, articles or medicines for procuring abortions, or for the prevention of conception, or for self pollution.~~

4. ~~Gaming table, establishment, device or apparatus kept or exhibited for the unlawful gaming or to win or gain money or other property and money, or other property won by unlawful gaming.~~

5. That affiant believes and has good cause to believe that said personal property, or some part thereof is located and concealed in said City and County in a certain two story brick and residential building located at 730 E. 125 St. suite #5 and #6 upstairs ~~in said City and County and known as~~ _____. Affiant further deposes and says that the facts upon which such belief is based are as follows:

Observations by members of the Cleveland Police Department and information from confidential sources.

Search to be made in the day Season _____
(If search to be made in the night season, state reasons therefore.)

and further deponent says not; contrary to the form of the Statute in such cases made and provided and against the peace and dignity of the State of Ohio.

These are therefore, to command you in the name of the State of Ohio, with the necessary and proper assistance, to enter, in the day season or the night season, into said building garage, or other building in connection therewith as aforesaid, and there diligently search for Clearinghouse

bet slips, bet sheets, tapes, adding machines and other paraphernalia associated with Clearinghouse operations. and that you bring the same or any part thereof, found on such search, and also the body of John Doe (real name unknown) or Jane Doe (real name unknown) forthwith before our Municipal Court aforesaid to be disposed of and dealt with according to law.

Sworn to before me by the said Carl Delan and subscribed in my presence this 17 day of May, 1962.

GIVEN UNDER MY HAND, and seal of said Court, this 17 day of May, 1962.

NORMAN A. FURST
Judge of Cleveland Municipal Court

HELEN J. LYONS,
Clerk of Cleveland Municipal Court

By J. F. DEMPSEY
Deputy Clerk.

APPENDIX VII.

MOTION TO QUASH SEARCH WARRANT AND MOTION TO SUPPRESS.

Now comes the defendants, Joseph Harper, Leonard Schumpert, Augusta Humphrey, Mamie Bishop, Juanita Umphery, and Janice Thomas, by and through their duly retained counsel and respectfully moves this Court to quash the said search warrant issued herein, and to order the alleged property seized pursuant thereto, suppressed as evidence, which might otherwise be illegally used against them, and in support thereof aver as follows:

(1) That the affidavit on which said warrant is based fails to allege sufficient facts or allegations of facts and that such defect is fatal according to the statute in such cases made and provided, to-wit: Revised Code of Ohio, Section 2933.22.

(2) That the search warrant was improperly issued in that the affidavit was based on hearsay and conclusions rather than the affiant's personal knowledge or the existence of reasonable grounds to believe that the crime alleged was in the process of commission and that such defect is fatal according to the Constitution in such cases made and provided.

(3) That said search warrant was issued in violation of the Fourth Amendment of the U. S. Constitution and Article I, Section 10 of the Ohio Constitution and for the further reason that no probable cause existed as is required thereby.

(4) The search warrant as issued was further defective in the following respects: (a) was general in nature, (b) failed to particularly describe the place to be searched and the person, property or things to be seized.

(5) That the said warrant which purports to authorize the search of "John Doe" does not constitutionally authorize the search of any individual; hence, a search pursuant thereto of an individual is unwarranted, illegal, unconstitutional and void.

(6) That the warrant as issued authorizes a general or exploratory search, the type of which is prohibited by law.

(7) The warrant was not served in accordance to Revised Code of Ohio, Section 2935.12, the statute provided in such cases for the execution of search warrants.

WHEREFORE, the defendants pray that the search warrant herein be quashed for the reasons above set forth, as well as others to be disclosed at the hearing on this motion, and that the property thereby obtained be suppressed as evidence.

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Attorney for Defendants.

Office-Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 879.

MAMIE BISHOP, LEONARD SCHUMPERT, JANICE THOMAS, AUGUSTUS HUMPHERY and JUANITA UMPHRYES,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION.

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Respondent.

BRIEF IN OPPOSITION TO PETITION.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION.

There is no substantial federal question involved which would require this Court to review this case.

The questions herein presented were raised both in the Court of Appeals of Cuyahoga County, Ohio, and the Supreme Court of Ohio. The Court of Appeals affirmed without writing an opinion, and the Ohio Supreme Court refused leave to appeal.

The Ohio courts decided this case in accordance with the statutes of the State of Ohio and in accordance with the Constitution of the United States and the applicable decisions of this Court. There is therefore no substantial federal question involved.

QUESTION PRESENTED.

Were petitioners illegally convicted upon evidence obtained in a search and seizure under a search warrant where (1) acting upon information from a reliable informer, whose information has many times previously been found accurate, and upon three days' surveillance, police officers trailed a suspect to a certain apartment house; and (2) after police officers familiar with clearinghouse operations entered said apartment house through a common doorway and proceeded along a common hallway to suite No. 6 on the second floor, where they heard the clatter of adding machines, typewriters and other equipment indispensable to clearinghouse operations, they did not make an arrest but instead left the scene to procure a search warrant; and (3) they testified before a magistrate as to the details of their surveillance, personal observations and information; and (4) after obtaining a search warrant the officers returned to said suite No. 6 and upon peeking through the keyhole observed actual clearinghouse operations in progress in said suite.

STATEMENT OF THE CASE.

Leonard Schumpert and five other persons were indicted on a charge of carrying on a clearinghouse (R. C. 2915.13). Defendants filed a motion to quash the search warrant and to suppress evidence seized pursuant to the search warrant.

The cause came on for hearing before a Judge of the Common Pleas Court of Cuyahoga County, Ohio, on the motion of the defendants. Testimony and evidence were presented by the State and the defense. At the conclusion of arguments by counsel, the court overruled the motion and admitted the evidence. Trial by jury was waived by all the defendants. It was stipulated by and between counsel that the evidence to be presented on the merits would be the same as was presented in and during the motion to quash the search warrant and suppress the evidence.

The court found five of the defendants guilty as charged in the indictment. The Court of Appeals affirmed their conviction. The Supreme Court of Ohio refused leave to appeal and dismissed an appeal filed as of right.

"Clearinghouse," sometimes called "Numbers," is a widely spread and elaborate scheme of chance that involves many persons in its complicated operation. (R. 2.) Any amount from one penny to ten dollars can be wagered. One can place a bet on any number from 000 to 999. The winning number is then derived from a certain daily publication of quotations of stocks and bonds in the financial columns of the newspapers. If the winning number appears in such column, the odds are five hundred to one. Upon winning, a person betting one penny receives $5, a person betting $10 receives $5000. These tremendous odds entice and take money from those who can least afford to pay.

To illustrate the operation, let us assume that a person desires to wager ten cents on number "422." That person will seek a "writer." The "writer" may be on a street corner, at a newsstand, shoe shine parlor, tavern, in a home or most anywhere. (R. 3.) The "writer" will then accept the ten cent wager from the player and will record it on a pad. The player is given a carbon copy of his ten cent wager. A "writer" generally accepts these wagers from many persons and at about 1:30 P. M. he turns over the wager slips to a "pick-up man." The "pick-up man" gathers all the wagers from the various writers and takes them to a "drop location." At the "drop location" a trusted employee of the operation will then pick up all the bet slips and take them to a control office. A "drop location" is normally very secret. It could be in an automobile. It varies from day to day.

The clearinghouse office is the center of the entire operation. To avoid detection its location is also secret and is easily movable from place to place. All wagers have to be in the office not later than 2:30 P. M. At the central office, male or female personnel tabulate every wager slip. Seventy-five per cent is forwarded to the central office. Out of this the "pick-up man" gets a commission of 10%. The balance of 65% goes to clearinghouse operator.

At about 4:00 P. M. the winning number is selected from the stock edition of the local paper and the slips are then scanned to ascertain whether any player has selected the winning number. If any winning numbers are found, they are laid aside and circled with red. The amount of the winnings is deducted from the remittance made by the "pick-up man." The total of the business, the scanning of numbers and the compilation of the necessary books and records are all made at the central office. Adding machines are used. The entire operation is in violation of Section

2915.13 of the Revised Code of Ohio. Although sometimes as many as twenty, generally, at least four or five persons are employed in the central office, which, as we have pointed out, is the core of the entire operation. The arrests in this case were made at the central office.

The Bureau of Special Investigation of the Police Department of the City of Cleveland is assigned to investigate rackets and gambling operations. Sgt. Delau of that bureau, an officer with thirteen years of experience in investigation of clearinghouse activity and very familiar with its method, paraphernalia and manner of operation, testified for the State. On May 14, 1962, Sgt. Delau received information from a reliable source that one John Powers was operating a clearinghouse office at 12806 Edmonton Avenue, in Cleveland. (R. 18.) Powers was well known to the police both as a panderer and as a clearinghouse operator. Mamie Bishop Powers, one of the defendants herein, is his sister.

On May 14, the officer checked the address on Edmonton Avenue without incident. The following day, May 15, the officer spotted John Powers operating his car into the drive at 12806 Edmonton Avenue. After being in the house about ten minutes, Powers and a woman companion returned to the automobile and drove away. The officer was unable to follow the car to its destination but he did obtain the license number.

The following day, May 16th, Powers again emerged from the house on Edmonton Avenue with a woman. This time the officer traced them to 12611 Woodside Avenue in Cleveland, where Powers picked up two more women. 12611 Woodside was the residence of the defendant Mamie Bishop Powers. The officer continued to trail this party from Woodside Avenue to 739 E. 125th Street. At this point the three women hurriedly left the car and walked

along the building at this address. It was a two-story brick building containing six stores and residential apartments. In the rear of the building was a common entrance to the four residential apartments on the second floor. When they arrived at this address, the officer was able to see Powers and the three women walking along the side of this building toward this entrance. The officer then instructed patrolmen McCool and Wandra to make observations of the building.

On May 17th, 1962, when officers McCool and Wandra proceeded to the apartment at 739 E. 125th Street they had information that a 1961 Falcon automobile bearing Ohio License Number FU 419 would be driven to the apartment by John Powers, who had been trailed there on the day before by Sgt. Delau. They had a description of John Powers. This information was corroborated by the fact that when they arrived at the scene at 12:30 P.M., the Ford Falcon did arrive and it was driven by John Powers, who was accompanied in the car by two women. The officers had been instructed to ascertain exactly where these persons were going. The officer saw Powers and the two women enter a door at the south side of the brick building at 739 E. 125th Street. Officer Wandra then left the ordinary truck in which the police officers were parked and proceeded to the apartment building in order to find out into which particular apartment these persons were going. The address 739 E. 125th Street is posted on a driveway leading to these apartments located over the business stores.

The officer first attempted to ascertain the names of the occupants of these apartments but could not do so because there were no name plates on the mail boxes. He then checked the City Directory for the names of residents there for the past six years. All the names checked were

unknown. (R. 40.) He then entered a common doorway leading to the corridor on the first floor. There were two apartments on the first floor and there was no noise or activity coming from either of these apartments. He then went up to a common stairway to a hallway on the second floor, where Apartments 5 and 6 were located. The hallway doors to these apartments were closed but he heard human voices and the considerable clatter of adding machines coming from both apartments. He said, "There was noise coming from both apartments. There was a radio and voices of human talking and also adding machine noises." (R. 38.) This was at 3:00 P. M. It was brought out again under cross-examination that the corridor and stairway the officer traversed were for the common use of anyone who wished to visit the apartments. (R. 138.)

After these observations the officer contacted Sgt. Delau, who checked the telephone criss-cross directory to see if there were any names listed to Apartments 5 and 6. He was unable to find any. (R. 44.) The Sergeant then visited the Police Prosecutor's Office, where the affidavit was prepared. (State's Exhibits 1 and 2.) The officer presented it to Judge Fuerst of the Municipal Court of the City of Cleveland. The judge was informed in detail of the disclosures made in three days of surveillance by all the officers. (R. 46.) The judge signed the affidavit and a search warrant was obtained.

After obtaining the search warrant, at 3:40 P. M. the officers again proceeded to 739 East 125th Street. Sgt. Delau stationed Patrolman McCool on the outside of the building to watch for any gambling paraphernalia that might be tossed out the window. Sgt. Delau and Patrolman Wandra proceeded to the second floor of the building to Apartment 6. They heard considerable noise of adding machines coming from this apartment. (R. 48.) Sgt. Delau

then looked into the keyhole. He said he was positive that there was a clearinghouse office in the apartment and knocked on the door. It will be remembered that he had much experience with clearinghouse activity. The officer knocked on the door and the defendant Juanita Umphryes opened it. (R. 49.) He testified:

"Q. Did you talk to Juanita Umphryes at that time?

A. Only this, I asked her if she lived there and she said, yes. I said 'I am Sgt. Delau of the Cleveland Police Department.' I showed her a search warrant. I said, 'You're running a clearinghouse office. I am coming in.' At that time, I could see two of the defendants seated there in the living room.

Q. You say you saw two of the defendants sitting in the living room?

A. Yes.

Q. Who did you see seated in the living room?

A. Leonard Schumpert (defendant) was seated facing me, no more than eight feet away, and Joe Harper (defendant) was seated alongside of him, sort of with his face towards me at the door.

Q. What else did you observe just before you walked in?

A. From the doorway, I could look down a little, small hallway, and seated on a chair with an adding machine in front of her, I seen one of the defendants seated in what I later found out was a bedroom, and the defendant was Augusta Humphrey.

Q. Did you make any other observations when you entered, then?

A. Yes; at that time from the doorway, I could see this: I could see Leonard Schumpert seated on the couch in the living room facing me. He had an adding machine tape in his hand which he seemed to be scrutinizing.

On the floor in front of him I seen other adding machine tapes piled up in front of him.

Q. Was that the extent of your observations as you were there in the doorway?

A. From the doorway, yes.

Q. Then what did you do?

A. With that, I told Patrolman Wandra to watch the two gentlemen and Juanita Umphryes in the living room. I said, 'You just have them stay right where they are.' I instructed both Harper and Schumpert to remain seated where they were. I walked back to where, to just a short distance to where Augusta Humphrey was seated and I told her to sit tight and just as I walked back here, I could see in the bedroom off to my right, which I had not earlier seen, I seen two more of the defendants in that particular bedroom.

Q. Who were they?

A. Those two defendants closest to the door was Mamie Bishop Powers and alongside of her, a little further in the bedroom, was Janice Thomas.

Q. Now, Officer, tell us what happened after that

A. Well, I noticed in front of them they both had an adding machine, and there was an obvious display of clearing house slips right in front of them, so in watching them, I told this other officer, I told Wandra to holler out for Patrolman McCool to come up. Patrolman McCool came up and I told him to keep Mamie Bishop Powers and Janice Thomas in custody there, to question them, to search the room and all clearinghouse evidence, to collect that particular evidence.

I told Patrolman Wandra to watch Augusta Humphrey closer and then returned to the living room where Schumpert, Harper and Umphryes were seated." (R. 50, 51, 52.)

The six defendants were then arrested. With reference to questioning at the scene Sgt. Delau said, "I requestioned Schumpert again; I asked him just what part he played in it. He said, 'I'm checking the tapes.' He said,

'You got me; that's all there is.' " (R. 53.) After questioning the various persons at the scene the officers gathered up the clearinghouse paraphernalia that was on the premises. It was stipulated that the paraphernalia picked up was prohibited by statute.

Concerning the original informant, under cross-examination it was brought out that over a period of sixteen years this informer had related reliable information to the police officer. During this period his information had been the basis for twenty-five arrests. (R. 63.) Also over the years the officer had obtained between eight and ten search warrants derived from this man's information. (R. 65.)

The amount of clearinghouse wagers including the loose tabulation of the writers was taken at the scene. Some of the tabulation contained winning numbers for that particular day. Incidentally, at 4:30 P. M. when the officers were in Apartment 6 amidst the clearinghouse activity, Powers made a telephone call into the apartment to talk to the defendant Schumpert—thereby corroborating the information furnished by the original informant to the effect that Powers was in contact with the operation.

ARGUMENT.

In Ohio the issuance of a search warrant is regulated by statutes. Section 2933.22 of the Ohio Revised Code requires that there must be probable cause for the issuance of a search warrant. Under Section 2933.23 an affidavit must first be filed with a judge or magistrate. The affidavit must contain certain subject matter and the judge may demand other and further evidence before he issues the warrant. In this case the Honorable Norman Fuerst, a Judge of the Municipal Court of Cleveland, issued a search warrant based upon: (1) an affidavit duly filed and (2) oral testimony as to details by arresting officers. The petition herein is mainly based upon a claim that the required affidavit is defective.

We will discuss the chief complaints of the petitioners as they are directed towards the required allegations of the affidavit. The affidavit itself is attached to the record as State's Exhibit 2. Section 2933.23 requires that the affidavit must set forth the following specified subject matter:

1. The place to be searched.
2. The person to be seized.
3. The thing to be searched for.
4. That the complainant believes or has good cause to believe that the things are there concealed.
5. The complainant must state the facts upon which such belief is based.

In addition to the above, the judge or magistrate may demand other and further evidence before issuing such warrant.

(1) The Place to Be Searched.

On page 23 of the petition it is stated that the affidavit "did not with sufficient particularity describe the place to be searched," that it contains two addresses. The fact is that only one address is designated. It is 739 E. 125th Street, Cleveland, Ohio. Two suites are mentioned at that address, which is an apartment house. They are "suites 5 and 6 up." The officers searched suite Number 6. The warrant is not made any the less valid by reason of the fact that the officers searched only one of two suites they were authorized to search at that address. "The requirement of a description of the house or place to be searched is complied with where the warrant and affidavit upon which it is based describe the place to be searched as premises of a certain number on a certain street." *Cincinnati v. Bush*, 24 O. N. P. N. S. 81.

(2) Person to Be Seized.

Petitioners further complain that no persons are *named* in the affidavit or warrant. The affidavit sets forth "unknown persons." The trial court conclusively disposed of this complaint in the following from his opinion (R. 314):

> " 'The person to be seized,' is described sufficiently in the affidavit, to this Court's view, persons or unknown persons, and caused the taking of the evidence that has been presented; that it was impossible for the officers to know exactly who would be in that particular suite at the time in which they executed the search warrant.
>
> They made an effort by checking cross indices, telephone books, checking mailboxes, to determine who the occupant of such a suite was and by the same token, they knew from their experience and from the evidence that they had gathered prior to the

signing of the affidavit that this was a clearinghouse operation. So that, therefore, they could not, with any degree of accuracy or upon firm belief place on the affidavit the name of any person they could swear to as being in possession of gaming material."

In a leading Ohio case, *Nicholas v. City of Cleveland*, 125 O. S. 479, the Court stated:

"It was undoubtedly the purpose of the Legislature to require the complainant filing an affidavit to conform to the various particulars of that section, so that an officer executing a John Doe warrant, as in this case, could search only the particular place described in the affidavit and could seize only the person named in the affidavit, *if his name be known.*"

Here the petitioners' names were not known to the officers. Incidentally in *Nicholas v. City of Cleveland* the warrant was held defective on other grounds. Unlike the instant case, the affidavit in the *Nicholas* case did not state the facts upon which the belief of the officers was based.

(3) The Thing to Be Searched For.

Petitioners contend that the affidavit does not set forth the thing to be searched for. The affidavit clearly sets forth the following described property: "clearinghouse bet slips, bet sheets, tapes, adding machines and other paraphernalia generally associated with clearinghouse operations." The trial court observed, "This detailed list of personal property substantially satisfied the requirements of the statute regarding the things to be searched for and seized." (R. 313.) "In addition to that, this paraphernalia also comes under Section 2933.21 which I have previously read to you, Section (E), which describes that a judge may issue a search warrant for gaming apparatus." (R. 313.) It will be remembered that the

petitioners were convicted for violating Section 2915.13 R. C. which provides:

> "No person shall establish, open, set on foot, carry on, promote, make, draw, or act as 'backer' or 'vendor' for or on account of a scheme of chance known as 'policy,' 'numbers game,' 'clearinghouse,' * * *."

In *State v. Gardner,* 73 Ohio Law Abs. 319, 137 N. E. 2d 448, it was held that an affidavit alleging possession of "number slips" to be used in carrying on a numbers game states an offense.

(4) That the Complainant Believes or Has Good Cause to Believe That the Things Are There Concealed.

Section 2933.22 R. C. provides:

> "A warrant of search or seizure shall issue only upon probable cause, supported by oath or affirmation particularly describing the place to be searched and the property and things to be seized."

Petitioners say that the affidavit did not allege the existence of reasonable grounds to believe that a crime was in the process of commission. This contention is contrary to fact. The officers acted upon reliable information concerning a known character (Powers) active in clearinghouse operation. They trailed Powers along with two women to the apartment house in question. They entered a common doorway and climbed a common stairway to the exterior of the door to the particular apartment involved. Here they heard considerable noise of human voices coupled with the clatter of adding machines coming from inside this apartment. To their experienced ears such noises meant characteristic sounds of clearinghouse activity. The sound of such activity coming from within the apartment certainly justified a man of reasonable caution

to conclude that the crime of operating a clearinghouse was being committed.

This Court in *Brinegar v. U. S.*, 338 U. S. 160, has defined the standard of probable cause: That the facts must be sufficient unto themselves to warrant belief by a man of reasonable caution that a crime is being committed.

(5) Complainant Must State the Facts Upon Which Such Belief Is Based.

Petitioners claim that the affidavit fails to allege sufficient facts upon which to base probable cause. The trial court found that examination of the affidavit and the search warrant itself disclosed that the affidavit was prepared and the search warrant was issued, "* * * first of all, upon observations of members of the Cleveland Police Department and, secondly, from information from confidential sources." (R. 315.) The trial court commented further: "Taking the evidence as a whole, it is clear that the information that they received from the confidential source was merely the triggering device by which the observations and the subsequent information was gathered by members of the Cleveland Police Department." (R. 315.) The officers did not rely solely upon the information they had received concerning the clearinghouse activity of Powers but they went further and actually made positive observation at a precise point to which the information concerning Powers had led them. Here we have credible confidential information from an informant *plus* actual observation by police officers. These facts formed the foundation upon which the officers had good cause to believe that clearinghouse activity with its incident equipment and paraphernalia existed in the apartment.

The Judge or Magistrate May Demand Other and Further Evidence Before Issuing Such Warrant.

In this case we have the additional fact that acting under the above quoted Section 2933.23, Judge Fuerst did ask for and obtain further evidence before he issued the warrant. As the trial court observed, "* * * this evidence was given not only by the affiant to the affidavit but also by all three officers whose information was pooled to form the basis for the issuance of the search warrant." (R. 316-7.) Therefore, in consideration of all the allegations of the affidavit together with the oral testimony, the judge, in his exercise of sound discretion, issued the warrant.

The petitioners claim that the court erred in failing to direct the state to disclose the identity of the alleged informer and question the trial judge's reliance on *State v. Beck*, 175 O. S. 76, in ruling against disclosure. In invalidating the search and seizure in *Beck* (*Beck v. Ohio*, 379 U. S. 89), this Court did not reverse the ruling against disclosure in *State v. Beck;* and other cases recently decided by this Court (*Rugendorf v. United States*, 376 U. S. 528; *Aguilar v. Texas*, 378 U. S. 108; *United States v. Ventresca*, 33 Law Week 4193) have reiterated the conclusion that the identity of the informer need not be disclosed. The rule is well stated in 8 *Wigmore, Evidence*, Section 2374 (McNaughton rev. 1961):

> "A genuine privilege, on the fundamental principle stated *supra* Section 2285, must be recognized for the *identity of persons supplying the government with information concerning the commission of crimes.* Communications of this kind ought to receive encouragement. They are discouraged if the informer's identity is disclosed. Whether an informer is motivated by good citizenship, promise of leniency or prospect of pecuniary reward, he will usually con-

dition his cooperation on an assurance of anonymity—to protect himself and his family from harm, to preclude adverse social reaction and to avoid the risk of defamation or malicious prosecution actions against him. The government also has an interest in nondisclosure of the identity of its informers. Law enforcement officers often depend upon professional informers to furnish them with a flow of information about criminal activities. Revelation of the dual role played by such persons ends their usefulness to the government and discourages others from entering into a like relationship.

That the government has this privilege is well established, and its soundness cannot be questioned."

In *Rovario v. United States,* 353 U. S. 53, relied on by petitioners, the informant took a material part in bringing about the defendant's possession of the contraband.

The Federal rule in search and seizure is well established. Whether or not a search is reasonable depends upon the facts in each particular case.

Much of the petitioner's argument is devoted to a blanket discussion of the decisions of this Court on search and seizure. Each of the cases cited is distinguishable on the facts. The federal cases on search and seizure are well summarized by Mr. Justice Clark (who had written the opinion in *Mapp v. Ohio*) in *Ker v. California,* 375 U. S. 23. Headnotes five and eight read:

5. "Mapp v. Ohio did not attempt the impossible task of laying down a fixed formula for the application in specific cases of the constitutional prohibition against unreasonable searches and seizures, but recognized that the Supreme Court would be met with recurring questions of the reasonableness of searches and that reasonableness is in the first instance for the trial court to determine, thus indicating that the usual weight be given to findings of trial courts."

8. "There is no formula for the determination of reasonableness of a search, but each case must be decided on its own facts and circumstances."

To illustrate the distinction in cases cited by petitioners in *Miller v. United States,* 357 U. S. 301, the officers broke the door without a warrant and without announcing themselves. There was no notice of authority.

In *Giordenello v. United States,* 357 U. S. 480, 2 L. ed. 2d 1503, the officers arrested under an arrest warrant. Unlike the instant case, there the complainant gave no source of the complaint's belief. The officer arrested on his own complaint and acted on the basis of personal knowledge *with no observation or setting forth probable cause.* Giordenello drove to a certain house followed by a well known police character. When he left the house he was nabbed by the police.

Petitioners cite *Aguilar v. Texas,* 378 U. S. 108, 12 L. ed. 723, claiming the analogy between the case here on appeal and the *Aguilar* case is "almost perfect." We submit that the analogy is not as perfect as appellants would have the Court believe. In fact, the *Aguilar* case strengthens the State's position.

The affidavit which the police officers in *Aguilar* submitted in support of their application for a search warrant, is set forth in the opinion of the Court as follows:

"Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates, and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law."

In a footnote to the foregoing, it is stated:

"1. The record does not reveal, nor is it claimed, that any other information was brought to the at-

tention of the Justice of the Peace. It is elementary that in passing on the validity of a warrant, the reviewing court may consider *only* information brought to the magistrate's attention. Giordenello v. United States, 357 U. S. 480, 486, 2 L. ed. 2d 1503, 1509, 78 S. Ct. 1245; 79 CJS 872 (collecting cases). In Giordenello, the Government pointed out that the officer who obtained the warrant "had kept petitioner under surveillance for about one month prior to the arrest." The Court of course ignored this evidence, since it had not been brought to the magistrate's attention. The fact that the police may have kept petitioner's house under surveillance is thus completely irrelevant in this case, for, in applying for the warrant, the police did not mention any surveillance. Moreover, there is no evidence in the record that a surveillance was actually set up on petitioner's house. Officer Strickland merely testified that 'we wanted to set up surveillance on the house.' If the fact and results of such a surveillance had been appropriately presented to the magistrate, this would, of course, present an entirely different case.

Headnote 1 holds

1. In passing on the validity of a search warrant, the reviewing court may consider only information brought to the magistrate's attention; hence, the fact that the police may have kept a suspect's house under surveillance is irrelevant where, in applying for the warrant, the police did not mention any surveillance."

Thus, there is a clear distinction between the situation in *Aguilar* and that in the case of these petitioners. Here not only did the affidavit mention "observation by members of the Cleveland Police Department," but the magistrate was informed in detail of the three days surveillance by all the officers whose information was pooled to form the basis for the issuance of the search warrant.

The recent decision of this Court in *Stanford v. Texas*, ____ U. S. ____, 33 Law Week 4140, relied on by the petitioners herein, refers to search warrants that (a) are general in nature, and (b) fail to describe particularly the place to be searched and the person or property to be seized. Here we have a warrant that specifically sets forth contraband to be seized at a specific address and describes the contraband as "clearing house bet slips, bet sheets, tapes, adding machines and other paraphernalia associated with clearinghouse operation."

The judgment of the magistrate in the present case in issuing the search warrant after hearing evidence in detail of the person observations and daily surveillance by the police officers is supported by the even more recent decision of this Court in *United States v. Ventresca*, ____ U. S. ____, 33 Law Week 4193.

Petitioners rely on *Beck v. Ohio*, 379 U. S. 89, to support their contentions, but the *Beck* decision was based on the state of the record in that case, which did not show what the officer's observations consisted of.

In the conclusion to the petition herein, *McDonald v. United States*, 335 U. S. 451, is cited. In the *McDonald* case the officers thought they heard an adding machine and "one of them opened a window leading to the landlady's room and climbed through it." There was an actual breaking and entering. They then proceeded to the second floor and stood on a chair and looked into the transom. They observed number slips inside the defendant's room and arrested the defendant McDonald. The opinion by Justice Douglas concluded:

> "When the officers heard the adding machine and at the latest when they saw what was transpiring in the room they certainly had adequate grounds for seeking a search warrant."

In the instant case when the officers heard the adding machines, they left the scene and returned to the court to procure a search warrant. Moreover, in the *McDonald* case the officers broke and entered the landlady's home by climbing through the window, while in the instant case there was no breaking and entering. The officers entered a common doorway in an apartment house, climbed a common stairway, and when they came to the door of Apartment 6, where they made their observations, they did not make an arrest but instead returned to the police station and procured a search warrant and then returned to the apartment in question. In the *McDonald* case, in a concurrent opinion, Mr. Justice Rutledge made the following observation:

> "* * * had the approaches been thrown open by an obliging landlady or doorman, they would have been legally in the hallways. Like any other stranger, they could then spy or eavesdrop on others without being trespassers. If they peeped through the keyhole or climbed on a chair or on one another's shoulders to look through the transom I should see no grounds on which the defendant could complain. If in this manner they, or any private citizen, saw a crime in the course of commission, an arrest would be permissible.
>
> But it seems to me that each tenant of a building, while he *has no right to exclude from the common hallways* those who enter lawfully, does have a personal and constitutionally protected interest in the integrity and security of the entire building against unlawfully breaking and entry. Here the police gained access to their peeking post by means that were not merely unauthorized but by means that were forbidden by law and denounced as criminal. In prying up the porch window and climbing into the landlady's bedroom, they were guilty of breaking and entering—a felony in law and a crime far more serious than the one they were engaged in suppressing. Having

> forced an entry without either a search warrant or an arrest warrant to justify it, the felonious character of their entry, it seems to me followed every step of their journey inside the house and tainted its fruits with illegality."

Here the occupants of Apartment 6 had "no right to exclude from the common hallways the police officers who entered lawfully." As Justice Rutledge points out in the *McDonald* case, here it inevitably follows that the officers made a lawful entry into the building, and after the Sergeant peeked through the keyhole and saw a felony in progress they had a right then and there to make an arrest without a warrant. Nevertheless, he did use the warrant, even though it was not required. He knocked on the door and informed the occupants of the room as to his identity and the fact that he had a search warrant.

CONCLUSION.

The officers did use a search warrant in this case. They obtained a warrant from a judicial officer "upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the things to be seized. Moreover, as observed by Mr. Justice Rutledge in *McDonald v. United States,* as events progressed, without any breaking or entering, to the point where the officers actually saw a felony being committed, a search warrant was not even necessary.

These petitioners have not shown any deprivation of constitutional protection against unnecessary invasions of privacy entitling them to review by this Court. The writ should therefore be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 879.

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JUANITA UMPHRYES,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

REPLY BRIEF OF PETITIONERS
To Respondent's Brief in Opposition to Petition For Writ of Certiorari.

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REPLY BRIEF OF PETITIONERS
To Respondent's Brief in Opposition to Petition For Writ of Certiorari.

Respondent's Brief in opposition, in its counter-statement of facts, set forth the following selected points:

1. That "on May 14, 1962, Sergeant Delau received information from a reliable source that one John Powers was operating a clearinghouse at 12806 Edmonton Avenue in Cleveland." (Respondent's Brief at page 5.)

2. That upon later seeing John Powers both enter and leave the Edmonton Avenue address, and upon further developing this lead which led them to the apartment house address of 739 East 125th Street, one of the officers "* * * then entered a common doorway leading to a corridor on the first floor. There were two apartments on the first floor and there was no noise or activity coming from either of these apart-

ments. He then went up a common stairway to a hallway on the second floor, where apartments 5 and 6 were located * * * there was noise coming from both apartments. There was a radio and voices and the considerable clatter of adding machines coming from both apartments." (Respondent's Brief at page 7.)

3. That the issuing magistrate "was informed in detail of the disclosure made in three days of surveillance by all three officers"; whereupon, "[t]he judge signed the affidavit and a search warrant was obtained." (Respondent's Brief at page 7.)

Based on these selected excerpts, it is apparent that respondent is attempting thereby to suggest the reliability of their "informer" was established "in the light of the 'fundamental criteria' laid down by the Fourth Amendment and in the opinions of this Court applying that amendment." *Ker v. California*, 374 U. S. at 33. What is being overlooked, however, is that here refusal to disclose the identity of an alleged informer denied the petitioners the only effective and available means of rebutting the police officers' testimony that there was an informer, that he gave them any information, that he was reliable, and that they were reasonable in relying on such information.

Next, by virtue of such argument—with the repeated references to a common doorway and a common hallway—they mean to suggest either that the officer, who admitted he entered this building and ascended to the second floor to eavesdrop, was not a trespasser, or that he had a lawful right to eavesdrop on the second floor of this building (that is, search) for evidence to support the issuance of a search warrant.

The short answer, of course, is that the statutes of Ohio, R. C. of Ohio, § 2909.21, forbid anyone without lawful authority from entering upon the premises of another. But, in this cause, that is not all. For it is clear not only

that their method in entering was unlawful, but their purpose was to invade the right of privacy of the tenants and their guest who might perchance be on the premises. Clearly such brazen conduct cannot be countenanced, which is what is being done when evidence acquired by such conduct is used as a basis for establishing probable cause for a search warrant. Surely, it is the law that where the information on which a warrant was obtained was the result of a trespass within the curtilage of the petitioner, a search under such warrant is constitutionally impermissible.

Also, in its statement of facts respondent unrealistically emphasizes the contention that the magistrate was meticulously informed of the details of their surveillances. If it does not suffice to say that the record exposes considerable doubt as to whether or not any policeman other than Sergeant Delau talked to the magistrate before he authorized the search, then it need only be said, in the "no more than 5 minutes" Sergeant Delau testified he talked to the magistrate (during which conversation he affirmatively indicated that the other officers involved were somewhere else) that from a time factor alone it would tax credulity to believe that "the judge was informed in detail" of their observations. (See R. 46, 58.) On the other hand, assuming *arguendo* that such details were furnished the magistrate, still even these "facts" would not have satisfied the requirement that probable cause must exist for the issuance of a warrant.

I.

The further argument made by respondent (at page 13 of its brief) reduces itself to a bold contention that if probable cause exists to search one of two apartments, the designation in the warrant of both apartments, in-

cluding the apartment for which there is no probable cause to search, can be viewed as merely containing surplusage. See *State v. Rathushyn*, 82 N. J. Super. 499 (1964), which held that a warrant describing an entire apartment building, when probable cause is shown for searching only one apartment, is void for failure to comply with the Fourth Amendment, and that for purposes of particularization separate apartments are the same as separate dwellings.

Also, in our case, the conclusion most difficult to escape is that the officers were guessing there was some numbers activity being carried on in one of these apartments, so they got a warrant in hopes of confirming their suspicions.

II.

In the next division of its argument, respondent would have this Court approve the use of "John Doe" warrants. In our judgment, the fact that such denomination was required further strengthens the position taken by petitioners that no probable cause was available. Also, that to sanction such a warrant in face of the concession by Respondent, that: "Here the petitioners names were not known to the officers" (Respondent Brief, at page 13), would create a situation where the lack of an identification would entitle the officer to a broader warrant than he could obtain with the identification.

On the other hand, if the officers had had probable cause to arrest any person, such information would have yielded a description sufficient enough to have satisfied the requirements of the constitution. *Dow v. State*, 207 Md. 80, 113 Atl. 2d 423 (1955); *Garret v. State*, 270 P. 2d 1101 (Okla. Crim. 1954); *Parker v. Tenn.*, 177 Tenn. 380, 150 S. W. 2d 725 (1941).

III.

In defending the general designation, on their warrant, of all the property one would expect to find in a numbers office, as the property to be seized, the respondent ignores the fact that not even their "informer" gave them any information as to precisely what property could be found on these premises. Indeed, the informer's information supposedly related to a different address and was of a general and unspecified nature. To be sure, it was not established that the informer had ever seen this evidence (see *Rugendorf v. United States*, 376 U. S. at 532), and the trespassing officer stated only that he heard adding machine noises. At best, the conclusion that all of these particularized items of property would be found on the premises was the "educated" guess of Sergeant Delau, as distinguished from the magistrate. If this is so, can the educated guess of a policeman supplant the sensible requirement that the magistrate must make his own independent judgment as to the existence of probable cause to believe property, he would authorize a search for, was at a particular place? Here, we contend that this was a general warrant and authorized a general or exploratory search in a manner not significantly dissimilar to the search forbidden by this Court in *Stanford v. Texas*, 379 U. S. 476 (1965).

IV.

The respondent further argues that ultimate persuasibility is to be accorded the conclusions of the officers because "[t]o their experienced ears such noises mean characteristic sounds of clearinghouse activity." And that "[t]he sound of such activity coming from within the apartment certainly justified a man of reasonable caution to conclude that the crime of operating a clearinghouse

was being committed." (Respondent's Brief at pages 14-15.) Also, it is asserted that the facts upon which these officers predicated their belief were set out in the affidavit. In addition to being ambiguous, such contention cannot find support in the facts which show as the sole affidavit submitted to the magistrate being that of Sergeant Delau.

Moreover, in this same regard, it is interesting to note (1) Sergeant Delau testified that he was not asked, nor did he relate to the magistrate who the informer was. And (2) nowhere does it appear, in the affidavit, what were the specifics of the informer's information. In addition to this, (3) nowhere in the affidavit, or the evidence, is there even the suggestion that the magistrate was informed of some of the underlying circumstances from which the informant concluded that John Powers was conducting a clearinghouse operation on Edmonton Avenue; and (4) nowhere in the affidavit, or the evidence, is there even the suggestion that the magistrate was informed of some of the underlying circumstances from which the officer concluded that his informant, whose identity was not even inquired into (R. 58-62), was credible or his information was reliable. Cf. *Rugendorf v. United States,* 376 U. S. 528 and *Jones v. United States,* 362 U. S. 257.

V.

Under the next division of its Brief, Respondent argues for the crystallization by this Court of the questionable practice whereby patently defective warrants can be cured by belated claims that evidence other than that reduced to affidavit form was considered by the issuing magistrate before he authorized the search. Merely to say this would be a practice fraught with dangers—less only in

degree, to that of the "fictitious or phantom informer"—may be sufficient.

On the other hand, at least this much is clear: this magistrate did not have a distinct recollection of what, if anything, was said by anyone when he participated in the warrant process here involved.

VI.

By the final remarks, in its brief, respondent disputes that *McDonald v. United States*, 335 U. S. 451, supports petitioners' contentions. In doing so they approvingly quote from the concurring opinion by Mr. Justice Rutledge. (Respondent's Brief, page 21.) The precise language being referred to is the statement:

> "But it seems to me that each tenant of a building, while he has no right to exclude from the common hallways those who enter lawfully, does have a personal and constitutionally protected interest in the integrity and security against unlawful breaking and entry."

And then they conclude that "the occupants of apartment 6 had 'no right to exclude from the common hallways the police officers who entered lawfully.' " Such reasoning is clearly fallacious, which fallacy lies in the fact that an essential premise in their syllogism is defective. It assumes a fact at least in issue if not resolvable against them; that is, was the officer lawfully on the premises after he entered the common doorway and ascended to the common hallway "to see what the persons inside were doing" (R. 140-141). He was a trespasser pure and simple. This conclusion seems inescapable.

CONCLUSION.

For the foregoing reasons, as well as for the reasons set forth in their petition for Writ of Certiorari, petitioners renew their prayer that the petition for Writ of Certiorari be granted.

Respectfully submitted,

JAMES R. WILLIS,
Counsel for Petitioners.

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APPLICATION FOR REHEARING ON PETITION FOR CERTIORARI.

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APPLICATION FOR REHEARING ON PETITION FOR CERTIORARI.

Petitioners respectfully request that this Court grant rehearing of its order dated April 26, 1965, which denied certiorari, and that the Court now grant certiorari.

I.

The Petition for Certiorari previously filed herein presented the following questions:

> 1. Whether the petitioners' convictions under R. C. of Ohio § 2915.13 is contrary to the due process clause of the Fourteenth Amendment to the United States Constitution because of the admission of evidence seized in violation of the "constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain"?
>
> 2. Whether a sufficient basis for the determination that probable cause existed to support the is-

suance of a search warrant was afforded by an affidavit which merely alleged:

a. that various items generally associated with the numbers game were in the possession of unknown persons, and

b. that such items were possessed by these "unknown persons" with the intent by them to commit a crime involving the numbers game, and

c. that affiant's belief was predicated on observation by the Cleveland Police and information from confidential sources.

3. Whether a state court can refuse to require disclosure of an unnamed and unidentified informer where no probable cause can be shown to exist without the information of such informer?

4. Where an officer seeks a warrant based in part upon information supposedly supplied by an informer, whose identity is neither disclosed in the affidavit, nor inquired into by the magistrate, and where the affidavit does not disclose any basis for crediting the informer's information, can a trial court:

a. refuse to require that the identity of such informer be disclosed, and/or

b. allow the officer to conclusively establish that an alleged informer is reliable simply by affirming that he had supplied information in the past that was accurate.

5. Can a State authorize the practice of permitting applicants for warrants to bolster their affidavits by rendition of secret and unrecorded testimony to issuing magistrates; or, is the requirement of the constitution such that an affidavit is fatally defective when "it does not set forth any * * * sufficient basis upon which a finding of probable cause could be made," notwithstanding any supporting evi-

dence that may have been considered by the issuing magistrate, but was not a part of the affidavit?

6. Whether a police officer can trespass upon private property in violation of the Constitution and state law, there secretly eavesdrop, and use what was supposedly heard as a basis for the establishment of probable cause for the issuance of a search warrant?

II.

The Petition for Certiorari developed the very real danger that, should this Court not intervene, the grudging applications Ohio Courts continue to give the constitutional standards developed by this Court will have found, in the cause, tacit approval of tactics that cannot be squared with the constitution. And, although it is conceded that none of the Courts in Ohio, that considered this cause, expressly approved the affidavit and the warrant issued, which warrant merely set forth that it was based on "observation by members of the Cleveland Police Department and information from confidential sources," it would tax credulity not to suppose that those same Courts will not view this Court's refusal to even consider the matter as a vindication of the patently erroneous notion that the requirements of the constitutions can be satisfied, and the prohibition against conclusory statements allayed, by mere testimony that additional information—not a part of the affidavit—was considered by the issuing magistrate. Further, that such belated assertions are sufficient, controlling and conclusive, even though the magistrate has no recollection of this additional information having been given, and the evidence offered in support of such thesis is not without serious conflict; so much so, as to create a real doubt that it did in fact happen.

III.

Moreover, subsequent to the filing of the original petition herein, this Court rendered its opinion in *United States v. Ventresca*, 380 U. S. 102 (1965), which opinion supports the argument made herein, but which, because of obvious reasons could not be developed in the original petition. Further, in our judgment, the *Ventresca* decision compels the premise, if nothing else, that something more than the mere conclusions of an affiant must be disclosed in the affidavit. Although in the *Ventresca* affidavit there was an abundance of statements, of dubious significance, it cannot be overlooked that the person arrested was the person being investigated. Further, the information, whatever it was, related to the person whose premises were ultimately searched. In this cause as argued in the petition, these officers did not know prior to entry, that any of the persons ultimately arrested were even on the premises. And all of the persons seen entering on prior days were strangers to the police. Also, it was necessary for the officer to trespass, in violation of an express state law, in order to obtain information to aid their quest for probable cause.

In our judgment, never will this Court have a clearer case, upon which it can delineate the basis upon which affidavits for warrants can be, if ever, supplemented by oral testimony. And surely this Court must eventually decide that even such additional factors, if approvable, must disclose either by themselves, or in conjunction with the affidavits, the existence of probable cause. Also, the Court can deem this an apt fact situation, to support the foreordained announcement that by the mere failure of a State Court to relate whether or not a conviction rests on independent state grounds, or that a decision on the federal question was essential to the state court judg-

ment, cannot defeat the jurisdiction of this Court, or otherwise handicap one who seeks to appeal on constitutional grounds.

For the above reasons, petitioners respectfully pray that this Court grant a Rehearing.

Respectfully submitted,

JAMES R. WILLIS,
Attorney for Petitioners.

CERTIFICATE OF COUNSEL.

The foregoing petition is believed to be well founded in point of law and has not been filed for purposes of delay.

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Attorney for Petitioners.